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In the

Supreme Court of the United States

October Term, 1975

No. 75-80

Asher Litman and Juanita Litman

Petitioners

vs.

Quarto Mining Company

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

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No. ____

Asher Litman and Juanita Litman

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vs.

Quarto Mining Company

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE OHIO SUPREME COURT

The Petitioners, Asher and Juanita Litman, respectfully pray that a writ of certionari issue to review the judgment and opinion of the Ohio Supreme Court, entered in this proceeding April 16, 1975.

OPINIONS BELOW

The opinion of the Court of Common Pleas of Monroe County, Ohio is appended hereto as Appendix "A".

The opinion of the Court of Appeals of Monroe County, Ohio

Seventh Appellate District is appended hereto as Appendix "B".

The second opinion of the Court of Appeals of Monroe County, Ohio Seventh Appellate District is appended hereto as Appendix "C".

The opinion of the Ohio Supreme Court is appended hereto as Appendix "D".

CONSTITUTIONAL PROVISION

United States Constitution, Article of Amendment 14.

JURISDICTION

The judgment of the Ohio Supreme Court was entered April 16, 1975, and appears as Appendix "D" hereto. We invoke the jurisdiction of this Court under 28 USC Section 1257 (3)

STATEMENT OF FACTS

In May, 1906, defendants-petitioners, predecessor in title executed a deed to a part of the coal in place in the property described in said instrument. In addition thereto, petitioners' predecessor in title in said deed stated as follows:

ASHER LITMAN TRACT:

"Together with all the rights and privileges necessary and useful in the mining and removing of said coal, including the right of mining the same without leaving any support for the overlying strata, and without any liability for any injuries which may result to the surface from the breaking of said strata, the right of ventilation and drainage however, to be in the ravines and waste place upon said lands and not nearer than twenty rods of the principal buildings thereon. Any surface ground required for shafts or openings, or machinery, ways, roads, houses for employees, etc. may also be taken by the grantee, his heirs or assigns, but shall be paid for before being occupied at the rate of One Hundred Dollars per acre, which payment shall thereupon entitle the grantee his heirs or assigns, to a deed in fee for the same. Also the exclusive

rights of way for the purpose of mining, ventilating, draining and transporting the coal of other lands through the mines and openings in upon and over the said lands of the grantor."

JUANITA LITMAN TRACT;

"Together with all necessary or convenient rights of way on the surface and under it for the purpose of approaching, mining, removing and transporting said coal, and also the coal under other lands and to at pleasure, place, maintain, remove and replace on the surface or under it all fixtures, structures, and machinery and appliances deemed necessary or convenient to the operation of the mines and to do all things required to air and drain the workings through the surface of said lands and to erect and maintain on the surface poles and wires for electrical power and also the power to mine and remove all of said coal with or without having support to the surface of said lands with a waiver by the grantors of all damages whatever for any injury to the surface or to water courses or roads or ways by reason of the mining and removal of said coal and said grantees are also given the option to at pleasure buy and require a like conveyance of the surface exclusive of buildings at the price of Two Hundred Dollars per acre payable in cash when conveyed."

Sixty-seven years after the execution of this purported agreement, the palintiff-respondent, the purported successor in title, commenced an action to acquire portions of the premises in question.

The Trial Court held that the right to purchase was not a bare option but that it was an integral part of the bundle of rights which vested in the owner of coal when it was conveyed seperately from the surface. Petitioners contended throughout, both in their pleadings and assignments of error, that the purchase clause in the original deed was a bare option at best, which would be barred after fifteen years in accordance with Ohio Revised Code Section 2305.06. Further, that if it was any more that a bare option, it violated the Rule against Perpetuities as set

forth by Ohio Revised Code Section 2131.08. It was also contended by petitioners throughout that the option was invalid by virtue of the Marketable Title Act.

The Appellate Court determined that the exercise of an option to purchase surface land for mining purposes, beyond the period provided by Ohio Revised Code Section 2131.08, would violate the public policy purposes of such statute.

It was also held by the Appellate Court that the option to purchase the surface land was on executory contract which would be barred after fifteen years pursuant to Ohio Revised Code Section 2305.06, however, the Court held that it was unnecessary to decide this question because of the application of Ohio Revised Code Section 2131.08.

Although neither the respondent nor the petitioners in the trial court contended that the respondent had an easement over petitioners land, the first holding of the Court of Appeals was that the 1906 coal deed gave to the respondent an easement for such use of the surface land as would be required for the removal of coal from petitioners' land for a beltway to transport coal from other lands, not only those immediately adjacent to petitioners' property but land some distance away.

The Ohio Supreme Court reversed the Appellate Court and held the options valid. The court ordered the petitioners to convey their land at the actual market value and if the parties could not establish the actual market value, the trial court should grant specific performance upon the payment of the actual value of the property. It is from this judgment that Petitioners seek a writ of Certiorari from this Court.

TRAVEL OF THE CASE

This case was the first heard in the Court of Common Pleas of Monore County. The Court held that the options to purchase were "an integral part of the bundle of rights which vested in the owner of the coal when it was conveyed seperately from the surface and were therefore not subject to the rule against per-

petuities.[11] The Court also found the proposed belt line to be "necessary and useful and convenient in obtaining and transporting the coal," and therefore ordered the conveyance to the respondent of 1.32 acres from the Asher Litman tract and 1.568 from the Juanita Litman tract, upon payment of the prices specified in the deeds.

Appeals were taken in the Court of Appeals. In its "First Opinion" on November 14, 1973, the Court reversed the judgment of the Court of Common Pleas and found the provisions in petitioners' deeds void by virtue of the rule against perpetuities, but found the respondent had an easement over petitioners' lands. The Court of Appeals continued the case on the question of whether respondent's easement included an overhead belt line. In its "Second and Final Opinion" of January 23, 1974, the court found that respondent's easement did extend to the construction and operation of an overhead belt line, electric power transmission lines, and an access road along the belt line.

Respondent and Petitioners appealed the judgments of the Court of Appeals, and the case came before the Ohio Supreme Court pursuant to the allowance of motions to certify the record. The Ohio Supreme Court reversed the judgment of the Court of Appeals and held the options to be valid. Accordingly, the Court ordered the Petitioners to convey their land at the "actual value of the property." It is from this judgment that Petitioners seek a writ of certiorari.

QUESTION PRESENTED

Does a state court deprive a land owner of his Fourteenth Amendment guaranty of due process when it commits a gross and obvious error in applying state law and thereby forces the land owner to convey his property against his will?

REASONS FOR GRANTING THE WRIT

I. This writ should be granted by this Court because the decision below works a denial of the Fourteenth Amendment

guaranty of due process in that the Court below committed gross and obvious errors in applying state law.

Under the Fourteen Amendment, states are forbidden to deprive persons of life, liberty or property without due process of law. *Green v. Frazier*, 253 US 233, 238 (1920). There is no doubt that state action through its judicial branch can violate the federal guaranty of due process. *Brinkerhoff-Faris Trust and Savings Co. v. Hill*, 281 US 673,680 (1930). We realize that the Fourteenth Amendment does not raise a federal question in every case to test the justice of a decision. *Worcester County Trust Co. v. Riley*, 302 U.S. 292, 299 (1937). However, when a Court commits gross and obvious error, as the Ohio Supreme Court did in the instant case, and thereby takes property by force of judgment there has been a deprivation of due process, *Roberts v. New York*, 295 US 264, 277 (1935).

The Ohio Supreme Court has determined that petitioners must convey their property, against their will, to respondent. The Court committed gross error in arriving at its decision.

The first gross error the court committed was in the application of Ohio Revised Code Section 2305.06 which provides that "an action upon a specialty or an agreement, contract, or promise in writing shall be brought within fifteen years after the cause thereof accured." The Court referred throughout its opinion to the provisions in the deed as "options". Nevertheless the Court specifically inforced these option contracts after a period of time had elapsed which was greatly in excess of the fifteen year statutory limitation provided by ORC 2305.06.

The Court stated in reference to ORC 2305.06, "a cause of action for conveyance of property did not accrue until the surface was needed for the exercise of grantee's mineral rights." Clearly, this is not the law in Ohio. It should be noted that the option provisions established no definite time for the exercise of the option. Where no time for performance is specified in the contract, a presumption exists that performance is to be made within a reasonable time, *Rosenkratz v. West* 2 O.L.A. 490 (1923). In *Rosenkratz* "supra," a period of slightly more than two years for offer or tender of payment on a contract for purchase of realty was

held not to have been made within a reasonable time. Therefore, if respondent ever did have a cause of action based on these option provisions it must be said to have accrued within a reasonable time after the execution of the deeds containing the option provisions. A reasonable time would be somewhat less than two years according to *Rosenkratz* "supra." Since respondent's cause of action on the option agreements therefore accured in less than two years after the option agreements were executed, respondent had fifteen years thereafter to bring suit upon said agreements which would mean that respondent had a total of slightly less than seventeen years to enforce his supposed rights under the option provision of the 1906 deed. Sixty-seven years after the option agreements were entered into, respondent, for the first time, attempted to assert his claimed rights thereunder. The Ohio Supreme Court has permitted respondent to do so in clear disregard of O.R.C. 2305.06 and has thus committed a gross and obvious error which requires correction by this court if petitioners are to be accorded their due process rights under the Fourteenth Amendment.

The second gross error the Ohio Supreme Court made was in applying the Marketable Title Act. We consider these statutes to clear defects and to make a title marketable as is stated in Ohio Revised Code Section 5301.48:

> "Any person having a legal capacity to own land in this State, who has an unbroken chain of title record to any interest in land for forty years or more, has marketable record title to such interest as defined in Section 5301.47 of the Revised Code."

The above section of the Revised Code must be read in connection with Section 5301.53 which reads in pertinent part as follows:

> "The provisions of Sections 5301.47 to 5301.56, inclusive of the Revised Code, shall not be applied: .. .. .. (E) to bar or extinguish any right, title, estate or interest in and to minerals, or any mining or other rights appurtenant thereto or exercisable in connection therewith; . . ."

Marketable record title as defined by the statute means a title of record, as indicated in Section 5301.48 of the Revised Code which operates to extinguish such interest and claims, except, those set forth in Revised Code Section 5301.53, existing prior to the effective date of the root of title, as is stated in Section 5301.50 of the Revised Code.

Asher Litman's predessor in title acquired title to the tract in question by a 1907 deed which conveyed a fee simple absolute with no restrictions or encumbrances. Using this as the root of title, the option provisions in the 1906 deeds are interests which existed prior to the effective date of petitioners root of title and would therefore be extinguished unless the options come within Section 5301.53. The Ohio Supreme Court determined that the options were 'exercisable in connection'' with the mineral estate and came within Section 5301.53. This was clearly error. Respondent introduced no evidence that it intended to mine any of the coal under the Litmans' property in the near future. Instead respondent has indicated that it intends to construct a belt line across petitioners' land to transport coal from other lands not appurtenant to petitioners' property. Since respondent has constructed a belt line across petitioners' property, but does not intend to mine the coal under petitioners land until some undetermined future date it cannot possible be said that the use of the surface land will be exercised in connection with the mineral estate. Therefore, the interest the options supposedly gave the respondent in petitioners' land does not come within Section 5301.53, but instead comes within Section 5301.48 and is extinguished. The holding of the Ohio Supreme Court in this regard was gross and obvious error.

II. This writ should be granted by this Court because of the public importance of determining the merits of this case.

Many property owners in the coal mining regions of this country have clauses in their deeds similar to the clauses in the Litmans' deeds. As the price of coal increases, coal companies will be increasingly be attempting to take advantage of these invalid provisions. These companies cannot be allowed to exercise private eminent domain, which is what occurs when a state

enforces these invalid provisions.

To allow the ruling of the Ohio Supreme Court to stand not only works a denial of due process as far as the Litmans are concerned, but it also subjects other land owners similarly situated to great uncertainty as to the actual ownership of their land. The owners' ability to convey their land is also severely restricted because of the validity the Supreme Court has given these void clauses. If the Court grants this writ the uncertainty as to the validity of these and similar provisions can be decided, and the restrictions on alienation that these invalid provisions impose can be removed.

CONCLUSION

For all the above reasons the petitioners pray that this Honorable Court grant this Writ of Certiorari.

Respectfully submitted
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APPENDIX A

IN THE COURT OF COMMON PLEAS OF MONROE COUNTY, OHIO

QUARTO MINING COMPANY,

Plaintiff,

v. No. 17,672

ASHER LITMAN,

Defendant.

MEMORANDUM OF DECISION

QUARTO MINING COMPANY,

Plaintiff,

v. No. 17,673

JUANITA LITMAN,

Defendant.

HODDINOTT, J.:

Plaintiff in these cases seeks conveyance of 1.32 acres from defendant Asher Litman and 1.568 acres from his wife, the defendant Juanita Litman. The land forms a strip across the Litman farm. It would be used for an overhead belt line to carry coal from the mine openings not on the Litman lands to loading docks on the Ohio River, for an electric power line, for a road to serve the belt line, and for other uses in mining coal.

Plaintiff owns recoverable coal under a huge tract including the Litman lands, together with certain mining rights. The company's first predecessors in title acquired ownership and rights in the two tracts in 1906. The mining rights in the Asher Litman coal include:

"all rights and privileges necessary and useful in the

> mining and removing of said coal ... Any surface ground required for ... roads ... may also be taken ... but shall be paid for ... at the rate of $100 per acre, which payment shall thereupon entitle the grantee, his heirs and assigns, to a deed in fee ... Also the exclusive rights of way for the purpose of ... transporting the coal of other lands through the mines and openings in, upon and over the said lands of the grantor.

The mining rights in the Juanita Litman coal are similar:

> all necessary or convenient rights of way, on the surface ... for the purpose of removing and transporting said coal, and also the coal under other lands and to at pleasure place, maintain ... on the surface ... all structures, machinery deemed necessary or convenient to the operation of the mines, ... and said grantees are also given the option to at pleasure buy and require a like conveyance of the surface ... at the price of $200 per acre.

The coal and these rights are now owned by plaintiff after two series of conveyances.

What the company proposes to do on the Litman lands is necessary and useful and convenient in obtaining and transporting the coal. Plaintiff has rights of way for this purpose and power to acquire the rights of way in fee after paying the prescribed prices.

These rights have been a matter of public record for more than 65 years, the conveyances in the chains of title have referred to them, and they are encumbrances on the Litman's land. Mining technology has changed materially since then, but the general nature of plaintiff's operation, judging from the language of the mining rights, was anticipated. The situation was entirely different in the case of *Franklin v. Callicoat*, 119 N.E. 2d 688 (1954) where similar mining rights were held not to cover removing the

entire surface in a strip mining operation. In that case, specific provisions in the deed necessarily implied that the surface of the land would generally be perserved.

The power included in the mining rights in question to purchase portions of the surface for specified purposes at a stated price per acre is not void for being contrary to the rule against perpetuities. Courts have held that the right to purchase is not a bare option, which presumably would be barred. Rather, it is an integral part of the bundle of rights which vested in the owner of the coal when it was conveyed separately from the surface. That is the law in this appellate district. *Hatcher v. National Coal Company*, Belmont County Court of Appeals (1924). To the same effect are *Powhatan Mining Company v. Lysien*, Belmont County Common Pleas Court, No. 10907 (1946) and *North American Coal Corporation v. Rucker*, Monroe County Common Pleas Court, No. 16437 (1964).

Courts in other jurisdictions, apparently without exception, have refused to apply the rule against perpetuities to this common pattern of mining rights, including the right to purchase at a prescribed price. 61 Am. Jur. 2d, Perpetuities, etc. Sec. 51, page 53; *Chicago W. & F. Coal Company v. Herr*, 40 F. Supp. 311; *Post v. Bailey*, 110 W. Va. 504, 159 S.E. 524; *Buck v. Walter*, 115 Minn. 239, 132 N.W. 205.

Plaintiff is entitled to the relief prayed for and is requested to prepare a judgment entry, submit it to defendants' counsel for approval as to form and then submit it to this Court for journalization.

Merle Huddinott
Judge

APPENDIX B

STATE OF OHIO, MONROE COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

QUARTO MINING COMPANY,

PLAINTIFF-APPELLEE,

-vs-

ASHER LITMAN,

DEFENDANT-APPELLANT.

QUARTO MINING COMPANY,

PLAINTIFF-APPELLEE,

-vs-

JUANITA LITMAN,

DEFENDANT-APPELLANT.

Case No. 465
FIRST OPINION
Case No. 466

APPEARANCES.

Thornburg & Furbee, St. Clairsville, Ohio, and Thomas & Thomas, Bridgeport, Ohio, for Plaintiff-Appellee.

Allan Sherry, Woodsfield, Ohio, for Defendants-Appellants.

Hon. Joseph Donofrio,
Hon. John J. Lynch,
Hon. Joseph E. O'Neill, JJ.

Dated: November 14, 1973

Grace Marten,
Court of Appeals Reporter,
Mahoning County Courthouse,
Youngstown, Ohio.

TOPIC INDEX

Mines and minerals — Ownership of minerals severable — Interests, rights and easements of owner of minerals — Easement, nature and characteristics — Perpetuities statute — R.C. 2131.08 (A) — Option to purchase surface land needed for mining operations is not prohibited if exercised within period provided by R.C. 2131.08 (A) — Application of 2131.08 (A) when no life can be taken as measure.

SYLLABUS

1. An easement "implies necessary a fee in another, and it follows that it is a right, by reason of such ownership, to use the land for a special purpose, and one not inconsistent with the general property in the land of the owner of the fee, his property rights, however, to be exercised in such way as not to unreasonably interfere with the special use for which the easement was acquired. Cincinnati, *Hamilton & Dayton Railway Co. v. Wachter*, 70 Ohio St. 113 at page 118.

2. A provision in a deed conveying title to coal which grants the right to purchase as much of the surface of the land as is needed for mining operations at a stipulated price is not an easement but is an option to purchase real estate.

3. When the right to purchase as much of the surface land as is needed for mining operations for a stipulated price is part of the rights incidental to mining operations specifically conveyed in a deed, such right is not prohibited by R.C. 2131.08 (A) if exercised within the period provided by such statute. If such right to purchase surface land is not exercised within the period provided by R.C. 2131.08 (A), such right is prohibited by R.C. 2131.08 (A).

4. If no life can be taken as a measure for R.C. Section 2131.08 (A), the maximum period is twenty-one years.

LYNCH, P.J.

These two cases were consolidated for hearing on appeal because the same legal principles are applicable to both cases.

Defendant, appellant herein, in both cases is appealing the order of the trial court that defendant, Asher Litman, executed and deliver a deed for 1.320 acres of his land to plaintiff for $132.00; that defendant, Juanita Litman, execute and deliver a deed for 1.568 acres of her land to plaintiff for $313.60, and that both defendants are enjoined from interfering with plaintiff in using and occupying such land for the purpose of mining and transporting coal belonging to plaintiff.

Defendants, Asher Litman and Juanita Litman, are husband and wife, but each have title to separate, adjoining parcels of real estate. Asher's parcel of real estate consists of approximately eleven acres and Juanita's parcel consists of approximately seven acres.

The parcels of land owned by the two defendants, which were ordered by the trail court to be conveyed to plaintiff form a strip across both parcels. They are to be used for an overhead belt line, for an electric power line, and for an access road along the belt line (R. 13, 24).

Plaintiff owns coal under a considerable tract, including the property owned by both defendants, together with certain mining rights. It plans to open a new mine to mine this coal and to build an overhead belt line to transport the coal from the mine openings to loading docks on the Ohio River. The mine openings are not located on the property of either defendant (R. 9, 13). Plaintiff eventually plans to mine the coal under the property of both defendants, but it will be many years in the future before this is done (R. 33-34).

The record established that plaintiff has title to the coal in the Pittsburgh No. 8 seam underlying the property of both defendants; that such coal is about two hundred and

eight feet from the surface, and that such coal can only be mined by means of a mine slope or deep mining (R. 22, 33-34).

Plaintiff's first predecessors in title acquired ownership and rights in such coal in the two tracts by separate deeds in 1906. Both excepted the surface or hill top vein. The mining rights of both deeds are set out as follows:

Asher Litman tract:

"... Together with all the rights and privileges necessary and useful in the mining and removing of said coal, including the right of mining the same without leaving any support for the overlying strata, and without any liability for any injuries which may result to the surface from the breaking of said strata, the right of ventilation and drainage and of access to the mines for men and materials; the shafts or openings for ventilation and drainage however, to be in the ravines and waste places upon said lands and not nearer than twenty rods of the principal buildings thereon. Any surface ground required for shafts or openings, or machinery, ways, roads, houses for employees, etc. may also be taken by the grantee, his heirs or assigns, but shall be paid for before being occupied at the rate of One Hundred Dollars per acre, which payment shall thereupon entitle the grantee, his heirs or assigns, to a deed in fee for the same. Also the exclusive rights of way for the purpose of mining, ventilating, draining and transporting the coal of other lands through the mines and openings in, upon, and over the said lands of the grantor."

Juanita Litman tract:

"Together with all necessary or convenient rights of way on the surface and under it for the purpose of approaching, mining, removing and transporting said coal, and also the coal under other lands and to at

pleasure, place, maintain remove and replace on the surface or under it all fixtures, structures, machinery and appliances deemed necessary or convenient to the operation of the mines and to do all things required to air and drain the workings through the surface of said lands and to erect and maintain on the surface poles and wires for electrical power and also the power to mine and remove all of said coal with or without having support to the surface of said lands with a waiver by the grantors of all damages whatever for any injury to the surface or to water courses or roads or ways by reason of the mining and removal of said coal and said grantees are also given the option to at pleasure buy and require a like conveyance of the surface exclusive of buildings at the price of Two Hundred Dollars per acre payable in cash when conveyed."

The record indicates that the first attempt to exercise the mining rights granted in the 1906 deeds was in 1972. The transfers of title in the chain of title of both defendants excepted the coal and mining rights necessary and useful in mining and removing the same from this and other lands without reference to the option to the purchase of needed surface land for mining purposes at stipulated prices.

We agree with the finding of the trial court that the rights of way across the property of both defendants which it seeks to obtain in this lawsuit is necessary for the mining and transportation of its coal that it is attempting to mine.

Defendants filed four assignments of error which they contend prohibits the plaintiff from securing the subject land for the following reasons:

1. The 1906 agreements violate R.C. 2131.08, which is the statute against perpetuities.

2. If such agreements do not violate R.C. 2131.08, they are executory contracts which are barred by R. C. 2305.06.

3. If title to any surface land vested in plaintiff's predecessors in title because of the 1906 deeds, defendants now own such property by adverse possession.

4. The 1906 deeds do not sufficiently describe the property to be conveyed so as to comply with R.C. 1335.05, which is the statute of frauds.

It has long been established that the ownership of minerals may be severed from the ownership of the surface of such property. 37 Ohio Jurisprudence 2d 15, Mines and Minerals, Section 12.

If the ownership of the minerals has been created by an absolute conveyance, the owner of the minerals has an estate in fee as long as the land contains such minerals as were conveyed to him, with an easement in the balance of the estate until the mine is exhausted. The conveyance of the minerals and severance of the ownership carry the rights to enter and remove the minerals, together with the right to use so much of the surface as may be reasonably necessary for that purpose unless the language of the conveyance by which the minerals are acquired repels such construction. The owner of the minerals may employ all reasonable means and appliances necessary to the proper working of the mine and the obtaining of the minerals. 37 Ohio Jurisprudence 2d 18-19, Mines and Minerals, Section 14.

A person cannot have an easement in his own land. When an easement is created, the fee of the land remains in the owner. 18A Ohio Jurisprudence 2d 431, Section 4.

In *Cincinnati, Hamilton & Dayton Railway Co. v. Wachter*, 70 Ohio Street, 113 at page 118, the court stated as follows:

> "An easement implies necessarily a fee in another, and it follows that it is a right, by reason of such

ownership, to use the land for a special purpose, and one not inconsistent with the general property in the land of the owner of the fee, his property rights, however, to be exercised in such way as not to unreasonably interfere with the special use for which the easement was acquired."

R.C. 5301.53 provides, in part, as follows:

"The provisions of sections 5301.47 to 5301.56, inclusive, of the Revised Code, shall not be applied: ...

"(E) To bar or extinguish any right, title, estate, or interest in and to minerals, and any mining or other rights appurtenant thereto or exercisable in connection therewith; ..."

R.C. 2131.08 (A) provides, in part, as follows:

"(A) No interest in real or personal property shall be good unless it must vest, if at all, not later than twenty-one years after a life or lives in being at the creation of the interest."

We hold that the conveyance of the coal in both deeds in question in this case together with the other mining rights with the exception of the right to purchase needed surface land at stipulated prices vested at the time of the deeds in 1906 and are not barred by either R.C. 2131.08, 2305.06 or 1335.05.

We further hold that a provision in a deed conveying title to coal which grants the right to purchase as much of the surface of the land as is needed for mining operations at a stipulated price is not an easement but is an option to purchase real estate.

The question then is whether such option violates R.C. Section 2131.08.

No reported Ohio case has come to our attention that is in point on this question.

However, former members of this Court had this

question before it in the unreported case of *Hatcher v. The National Coal Company* from Belmont County, which was decided January 3, 1924, the facts of which are as follows:

On July 10, 1917, in consideration of $15,024.50 Hatcher sold and conveyed all of the Pittsburgh or No. 8 vein of coal to defendant, together with certain mining rights and privileges including the following provision:

> "Said grantee, its successors and assigns, shall have the right to purchase at any time so much of said land as may be necessary for railroad and in mining, manufacturing and marketing said coal at the price of $100 per acre, upon receipt of which payment, the said grantor, his heirs and assigns, agree to deliver a deed in fee for the same."

Subsequent to December 22, 1920, the defendant offered the sum of $100.00 per acre for 7.79 acres of land for the purpose of building a railroad and mining and marketing the coal on Hatcher's property. Plaintiffs brought an action to restrain defendant from using the surface of the 7.79 acres on the basis that the foregoing agreement violated the rule against perpetuities in Ohio. This Court held that the defendant elected to take the 7.79 acres and to pay the required amount therefor within the period fixed by General Code Section 8622, which was a predecessor to R.C. 2131.08, therefore the provisions of such statute were not violated. Our Court specifically stated that the effect of the above quoted provision of the coal deed if no election was made within the period provided by General Code Section 8622, was not determined. We approve of the conclusion of the former members of this Court that under the circumstances of the Hatcher case, the paragraph relating to the occupation and purchase of the surface of the land for mining purposes did not violate the statute against perpetuities.

The unreported case of Belmont County Common Pleas

Court Case No. 10907, entitled *Powhatan Mining Company v. Lysien*, decided July 17, 1946, has been called to our attention; however, the deed conveying the coal provided for the payment of $200.00 per acre for all surface lands used for mining purposes. Thus, this was a stipulated payment for the exercise of the easement granted by the conveyance rather than an option to purchase such land at a stipulated price.

The unreported case of Monroe County Common Pleas Court Case No. 1643, entitled *North American Coal Company v. Rucker*, is similar to the Lysien case. In our opinion neither the Lysien case nor the Rucker case are in point with the instant case.

The case of *Barton v. Thau*, 246 Pa. 348, 92 Atlantic Reporter 312, is similar in facts to the instant case. The coal and other minerals underlying the land were conveyed by deed dated in 1881, and the case was decided in 1914. The deed contained the following provision:

> "And in case the said parties of the second part, their heirs or assigns, should at any future time whatsoever desire to purchase any of said land in fee simple, then the said parties of the first part, for themselves, their heirs or assigns, hereby convenant and agree to sell and convey the same to the said parties of the second part, their heirs or assigns, at a price not exceeding one hundred dollars per acre."

This option to purchase the surface land was never exercised, and the case arose on an action to remove a cloud on the title of the surface property. The Supreme Court of Pennsylvania held that the right to purchase the surface land contained in the above provision was an option to purchase, which under its terms could be exercised at any time in the future, and was void under the rule against perpetuities. The Court further held that where an event on which an estate is to arise is an option to purchase, which is so uncertain that it may expire at

some time in the future or may not expire at all, the interest created at the option is not "vested" but is "contingent" and within the rule against perpetuities. In the opinion of this case, the court cited authorities for the principle that when no life can be taken as a measure for the rule against perpetuities, the perpetuity period is twenty-one years.

There is a difference between the Barton case and the instant case in that the right to purchase in the instant case is conditioned on the need of the property to be purchased for mining operations, whereas this is not clearly apparent in the Barton case.

The case of *Chicago, Wilmington & Franklin Coal Co. v. Herr*, 40 F. Supp. 311, held that:

> "Under Illinois law, a deed conveying coal, oil and gas and the right to mine and remove them and to use so much of the surface as grantee might deem necessary, and providing that surface of the land should be paid for, when taken, at rate of $50 per acre, was not violative of rule against perpetuities'."

The conveyance of mineral rights was in a deed dated in 1905 and the case was decided in 1941. We recognize that this case is authority for the principle that an option to purchase as much of the surface of the land as is needed for mining operations at a stipulated sum does not violate the rule against perpetuities even though exercised after the period provided by such rule.

In *Buck v. Walker*, 115 Minn. 239, 132 N.W. 205, the Minnesota Supreme Court held than an exception in a deed of all minerals in the land conveyed, and a reservation of the exclusive and perpetual right of the grantor, his heirs and assigns, to enter on the lands to explore for and remove such minerals on payment to the owners of the land of the damages thereto by reason of such mining operations, or, at the grantor's option, on the payment of

an amount not to exceed $30 per acre for the land which would be injured therby, and to take a conveyance thereof, do not create a perpetuity, nor unreasonably restrict the grantee's use and alienation of his interest in the land, and are valid.

However, the conveyance of mineral rights was in deeds dated in 1903 and the Buck case was decided in 1911; therefore, the case was decided within the period provided by the statute against perpetuities. We agree with the result in this case, although we disagree with the implications of the case that the option to repurchase the land extended beyond the period provided by the statute against perpetuities.

In *Post v. Bailey*, 110 W. Va., 504, 159 S.E. 524, the West Virginia Supreme Court of Appeals held that a provision in a deed conveying coal underlying the grantor's land which provides that if the grantee desires to construct and maintain railroads, tramways, tipples, houses, or permanent improvements on any part of the grantor's land, the grantee should pay the sum of $40.00 per acre for every acre so used and occupied, does not violate the rule against perpetuities, since any rights granted by such provision vested at the time the deed took effect, although such rights may not be exercised immediately. The conveyance of coal rights was in a deed dated in 1900 and the Post case was decided in 1931. However, our interpretation of the Post case is that the payment of $40.00 per acre was the stipulated consideration for the easement granted for constructing permanent improvements on the surface land when needed for the mining of such coal rather than an option to purchase such surface estate. If our interpretation is correct, we agree with the result and reasoning of the Post case.

We hold that when the right to purchase as much of the surface land as is needed for mining operations for a

stipulated price is part of the rights incident to mining specifically conveyed in a deed, such right is not prohibited by R.C. 2131.08 (A) if exercised within the period provided by such statute. (See R.C. 2131.08 (C)). If no life can be taken as a measure for such statute, the maximum period is twenty-one years.

We further hold that if such right to purchase surface land is not exercised within the period provided by R.C. 2131.08 (A), such right is prohibited by R.C. 2131.08 (A).

The exercise of the right to purchase surface land is the acquisition of the title of such surface land rather than use of an easement. If no limit is placed on the exercise of such right, it could be exercised 100, 500, or 1,000 years after such right was granted. Such right would seriously restrict the use to which such surface property could be used and would affect the alienability of such property for an indefinite period of time. The use and value of the property would generally change considerably in a 66 year period which has elasped since the grant of the option to purchase to plaintiff's predecessors in title and the exercise of its option to purchase such property. We recognize the importance of the coal industry, and its need for certain mining rights to mine the coal that it owns. However, the owner of the surface has rights that also must be recognized. We conclude that the exercise of an objection to purchase surface land for mining purposes beyond the period provided by R.C. 2131.08 (A) would violate the public policy purposes of such statute.

In the instant case, the record does not reveal the identity of any person whose life can be taken as a measure, therefore, the maximum period during which the option in this case could be exercised expired in 1927 and was void thereafter. Since plaintiff did not exercise the option to purchase until 1972, the option was void at that time.

We feel that defendant's contention that the option of

defendant to purchase as much of the surface of the land as is needed for mining operation for a stipulated price is an executory contract that would be barred after fifteen years pursuant to R.C. 2305.06 has merit; however, no authority has been cited on this question, and it is unnecessary to decide this question because of our decision on the application of R.C. 2131.08.

We feel that defendant's contentions as to adverse possession and the application of R.C. 1335.05 have little merit, but it is unnecessary to decide these questions because of our decision on the application of R.C. 2131.08.

We hold that the trail court's orders that defendant, Asher Litman, execute and deliver a deed for 1.320 acres of his land to plaintiff for $132.00 and that defendant, Juanita Litman, execute and deliver a deed for 1.568 acres of her land to planitiff for $313.60 is error, and we reverse the judgment of the trail court to this extent.

Plaintiff still has an easement over the property of both defendants for the transportation of coal of other lands over the property of both defendants. However, neither counsel for the parties in this case briefed the question whether plaintiff's easement rights over the property of both defendants includes an overhead belt line planned by plaintiff. Because of this, this case is continued pending receipt of briefs from both parties.

Judgment of Monroe County Common Pleas Court that defendant, Asher Litman, execute and deliver a deed for 1.320 acres of his land to plaintiff for $132.00 and that defendant, Juanita Litman, execute and deliver a deed for 1.568 acres of her land to plaintiff for $313.60 reversed.

Case continued on question whether plaintiff's easement rights over the property of both defendants includes an overhead belt line planned by plaintiff pending receipt of briefs from both parties.

Donofrio, J., Concurs.

O'Neill, J., Concurs.

APPROVED:

John J. Lynch
Judge

APPENDIX C

STATE OF OHIO, MONROE COUNTY
IN THE COURT OF APPEALS
SEVENTH DISTRICT

QUARTO MINING COMPANY,

PLAINTIFF-APPELLEE,

-vs-

ASHER LITMAN,

DEFENDANT-APPELLANT.

QUARTO MINING COMPANY,

PLAINTIFF-APPELLEE,

-vs-

JUANITA LITMAN.

DEFENDANT-APPELLANT.

Case No. 465
SECOND AND FINAL OPINION.
Case No. 466

APPEARANCES.

Thornburg & Furbee, St. Clairsville, Ohio, and Thomas & Thomas, Bridgeport, Ohio, for Plaintiff-Appellee.

Allan Sherry, Woodsfield, Ohio, for Defendants-Appellants.

Hon. Joseph Donofrio,
Hon. John J. Lynch,
Hon. Joseph E. O'Neill, JJ.

Dated: January 23, 1974.

Grace Marten,
Court of Appeals Reporter,
Mahoning County Courthouse,
Youngstown, Ohio.

TOPIC INDEX.

Easement right of way of transporting coal from other lands - Overhead belt line - Electric power transmission line.

SYLLABUS

A deed conveying coal in place and rights of way for transporting coal, including coal under other lands, over the surface of the granted tract when the express and implied terms of the grant to the mineral owner permitted whatever use of the surface overlying the coal which might be reasonably necessary or useful in the mining of such coal as well as coal under other lands allows the owner of mineral rights to locate and erect an overhead belt line necessary for the transportation of such coal over the surface land of the granted tract.

LYNCH, P. J.

Since our first opinion both sides have submitted briefs on the question of whether plaintiff's easement rights over the property of both defendants includes on overhead belt line planned by plaintiff and we had another hearing on January 9, 1974 on this question.

The two deeds executed in 1906 both granted general rights of way for transporting coal, including coal under other lands, over the surface of defendants' properties without any designation as to any specific mode of transportation.

In all probability, the overhead belt line planned by plaintiff was not generally used in mining operations in 1906, thus it could not have been specifically contemplated by the parties to the deeds in question.

However, the deed in the Asher Litman tract grants "all the rights and privileges necessary and useful in the mining and removing of said coal", and the deed in the Juanita Litman tract grants "all necessary or convenient rights of way".

We overrule defendants' contentions that R. C. Section 5301.53 (E) is limited to mining rights appurtenant to the coal under the surface of the land and that plaintiff's easements on defendants' properties have been terminated by adverse possession.

No case concerning an overhead beltline has been called to our attention. However, there are cases in point concerning electric power transmission lines.

In *Creasey v. Pyramid Coal Corporation*, 116 Ind. App. 124, 61 N. E. 2d 477, the court held that a deed executed in 1905 conveying the coal in place and all surface rights reasonably necessary to the mining of such coal and coal under adjoining lands permitted the grantees' successor in title to construct and maintain across the surface of the granted tract a high voltage electric transmission pole line necessary for safe, effecient mining of coal under such land and under adjoining and other land. The court pointed out that since the use of electricity for mine operations in 1905 was unknown, the fact that such high voltage electric transmission pole line was not specifically enumerated among the rights granted raised no implication that such use was meant to be excluded, and that under the express

and implied terms of the grant the mineral owner might make whatever use of the surface overlying the coal which might be reasonably necessary in the mining of coal from adjoining and other lands.

In *Case v. Elk Horn Coal Corporation*, 210 Ky. 700, 276 S. W. 573, the court held that a deed executed in 1908 conveying the right to use surface land and to erect any buildings, machinery or equipment that it deemed necessary or convenient for the mining of all minerals permitted the location and construction of an electric power transmission line on such property. The court stated that unless this power was exercised "oppressively, arbitrarily, wantonly, or maliciously", the owner of the surface land could not complain. *Case v. Elk Horn Coal Corporation*, supra, was followed in *Trivette v. Consolidation Coal, Co.*, 296 Ky. 529, 177 S. W. 2d 868.

We hold that a deed conveying coal in place and rights of way for transporting coal, including coal under other lands, over the surface of the granted tract when the express and implied terms of the grant to the mineral owner permitted whatever use of the surface overlying the coal which might be reasonably necessary or useful in the mining of such coal as well as coal under other lands allows the owner of mineral rights to locate and erect an overhead belt line necessary for the transportation of such coal over the surface land of the granted tract.

Therefore, plaintiff's easement rights over the property of both defendants includes the overhead belt line planned by plaintiff, an electric power line and an access road along the belt line.

The complete holding of this court is now as follows: Judgment of Monroe County Common Pleas Court that defendant, Asher Litman, execute and deliver a deed for 1.320 acres of his land to plaintiff for $132.00 and that defendant, Juanita Litman, execute and deliver a deed for 1.568 acres of her land to plaintiff for $313.60 reversed.

Defendants, Asher Litman and Juanita Litman, are enjoyed from interferring with plaintiff exercising its easement rights over their property to locate and erect an overhead belt line, an electric power line and an access road along the belt line.

Donofrio, J., Concurs.
O'Neill, J., Concurs.

APPROVED:

JOHN J. LYNCH
PRESIDING JUDGE.

APPENDIX D

MINING CO. *v.* LITMAN.

Statement of the Case

Quarto Mining Co., Appellant, v. Litman, Appellee.
Quarto Mining Co., Appellee, V. Litman, Appellant.

(Cite as Quarto Mining Co. v. Litman (1975), 42 Ohio St. 2d 73)

Real property—Deed to mining rights—Option to purchase overlying surfact estate—Unlimited in time—Not void as restraint on alienation, when—Option appurtenant to mineral estate—Limited in use—Construction of overhead belt system—Contracts—Specific performance—Discretionary with court.

A land purchase option which is appurtenant to a mineral estate and is limited to the necessary and reasonable use of the overlying surface estate for the exercise of mining rights, is a vested part of the mineral estate and is not void as a restraint upon alienation, although unlimited in time.

(Nos. 74-251 and 74-316—Decided April 16, 1975.)

Appeals from the Court of Appeals for Monroe County.

This cause involved actions for specific performance of mining rights granted to Quarto Mining Company, plaintiff herein, as successor in interest under the deeds to two parcels of land owned by Asher and Juanita Litman, defendants herein. Plaintiff is

engaged in mining coal in Monroe County, Ohio, and is the owner of 51,700 acres of the Pittsburgh or No. 8 vein of coal, within the county. The coal under the surface lands owned by the defendants was conveyed by deed to the plaintiff's predecessor in title in 1906, along with grants of mining rights, rights of way for the purpose of transporting coal both from the defendants' land and from other lands, and options to purchase the surface land for prices of $100 per acre of the Asher Litman tract, and $200 per acre of the Juanita Litman tract. Defendants' tracts of land lie in a valley near the Ohio River, and plaintiff seeks to operate an overhead conveyor belt across defendants' lands which would transport coal from a mine entrance on other lands to loading docks on the Ohio River. The total length of the conveyor belt line would be approximately 5,000 feet, and it would be used to transport about 3.2 million tons of coal a year. It would pass across defendants' lands at a height of from 25 to 32 feet, supported by columns affixed to the land and accompanied by electric power transmission lines and an access road.

The Court of Common Pleas held that the options to purchase were "an integral part of the bundle of rights which vested in the owner of the coal when it was conveyed separately from the surface," and were thereofer not subject to the rule against perpetuities. The court also found the proposed belt line to be "necessary and useful and convenient in obtaining and transporting the coal," and therefore ordered the conveyance to the plaintiff of 1.32 acres from the Asher Litman tract and 1.568 from the Juanita Litman tract, upon payment of the prices speicfied in the deeds.

Appeals were taken to the Court of Appeals. In its "First Opinion" on November 14, 1973, the court reversed the judgments of the Court of Common Pleas and found the provisions in defendants' deeds void by virtue of the rule against perpetuities, but found that plaintiff had an easement over defendants' lands. Accordingly, the Court of Appeals continued the cases on the question of whether plaintiff's easement included an overhead belt line. In its "Second and Final Opinion" of

January 23, 1974, the court found that plaintiff's easement did extend to the construction and operation of an overhead belt line, electric power transmission lines, and an access road along the belt line. Both plaintiff and defendants appealed the judgments of the Court of Appeals, and the cause is now before this court pursuant to the allowance of motions to certify the record.

MINING CO. *v.* LITMAN.

Opinion, per STERN, J.

Messers. Sherry & Yoss and *Mr. Allan Sherry*, for Asher and Juanita Litman.

Messers. Thornburg & Furbee, *Mr. Carter Thornburg*, *Messers. Thomas & Thomas* and *Mr. Harold B. Thomas*, for Quarto Mining Company.

Stern, J. The dispute in these cases is between the owner of recoverable coal and of mining rights to the coal, and the owners of the surface land overlying that coal. Plaintiff seeks to obtain title or use of a strip of defendants' lands in order to construct a belt line to transport its coal, under the provisions of two 1906 deeds; defendants claim that the rights to use of the surface estates granted by those deeds are void.

The relevant provisions of the 1906 deeds are that plaintiff may take surface ground required for mining purposes, including ground for the purpose of transporting the coal of other lands, and that the plaintiff may require the conveyance of the surface ground taken at specified prices.[1]

[1] The deed in the Asher Litman tract granted ownership of a specified vein of coal, and contained the following provision:

"'• • • Together with all the rights and privileges necessary and useful in the mining and removing of said coal, including the right of mining the same without leaving any support for the overlying strata, and without any liability for any injuries which may result to the surface from the breaking of said strata, the right of ventilation and drainage and of access to the mines for men and material; the shafts or openings for ventilation and drainage however, to be in the ravines and waste

The trial court and the Court of Appeals found that the proposed use of the surface land was necessary and useful for plaintiff's mining operations, and that finding is not disputed by defendants. The essential issue, as it was presented to the trial court, was whether an option, without time limitation, to purchase surface ground necessary for the exercise of mining rights granted incident to the sale of the underlying coal was specifically enforcable, or was void by reason of the rule against perpetuities as a restraint against alienation. Our resolution of that issue makes it unnecessary to consider other issues raised in the Court of Appeals.

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place upon said lands and not nearer than twenty rods of the principal buildings thereon. Any surface ground required for shafts or openings, or machinery, ways, roads, houses for employees, etc. may also be taken by the grantee, his heirs or assigns, but shall be paid for before being occupied at the rate of one hundred dollars per acre, which payment shall thereupon entitle the grantee, his heirs or assigns, to a deed in fee for the same. Also the exclusive rights of way for the purpose of mining, ventilating, draining and transporting the coal of other lands through the mines and openings in, upon, and over the said lands of the grantor.***"

The deed to the Juanita Litman tract contained the following provisions:

"* * * Together with all necessary or convenient rights of way on the surface and under it for the purpose of approaching, mining, removing and transporting said coal, and, also the coal under other lands and to at pleasure, place, maintain, remove and replace on the surface or under it all fixtures, structures, and machinery and appliances deemed necessary or convenient to the operation of the mines and to do all things required to air and drain the working through the surface of said lands and to erect and maintain on the surface poles and wires for electrical power and also the power to mine and remove all of said coal with or without having support to the surface of said lands, with a waiver by the grantors of all damages whatever for any injury to the surface or to water courses or roads or ways by reason of the mining and removal of said coal and said grantees are also given the option to at pleasure buy and require a like conveyance of the surface exclusive of buildings at the price of two hundred dollars per acre payable in cash when conveyed. * * *"

Athough it was not directly argued, the options to purchase contained in both deeds apparently are restricted to purchases incident to the exercise of the mining rights.

-I-

The fundamental purpose of the rule against perpetuities, as it developed in common law, was to prevent restrainst on the alienation of property which might be perpetual or unreasonably long, while permitting restraints limited within the strict period of the rule, in recognition of a property owner's rights to the use and disposition of his property. The complexities of the common-law rule are familiar to every first-year law student, although full understanding of its application and logic is no doubt a rare achievement.

A bare option exercisable outside the period of the rule is generally held to be void as an unreasonable restraint upon alienation. *London & South Western Ry. Co.* v. *Gomm* (1882), L. R., 20 Ch. D. 562; 3 Simes and Smith, The Law of Future Interests (2 Ed.), 156-163, Section 1244; Annotation, 162 A. L. R. 581.

As the courts have recognized, an option to purchase land can be a severe restraint on the free alienability of property. The fundamental defect of a perpetual option is that the right to alienate the property is divided into two roughly equivalent interest, and these interests may be so antagonistic as to effectively prevent the transfer of a fee simple estate. Where a definite option price is stated, an effective ceiling price is imposed on the property, above which no one may, with safety, purchase the property; the holder of the option in such case holds the effective power to alienate. Development and improvement of the property may thereby be severely retarded, for the existence of the option threatens the developer with loss of the profit from his efforts if the option is exercised. The possibility of fluctuation in land values and in the buying power of the dollar must further render imponderable the safety of any purchase of property encumbered by an option.

Because of this potential for the indefinite suspension of the "practical" power of alienation, and because the exercise of the option is so likely to depend upon changes in market value and level of development of the property over time, the courts have

generally held such an option to be a non-vested contigent equitable interest in property, subject to the rule against perpetuities. As one commentator has said: "The law would be in a chaotic state with respect to this particular problem if current fluctuating market prices were to be the criteria for determining the validity of long-term options in gross. It must be conceded that the market price of land has ever-present potentialities for change. That being the case, it also follows that the long-term land purchase option which expresses a fixed amount as to the price to be paid upon its being exercised may possibly bring about a restraint upon the practical power of alienating the optioned land. ****" Berg. II Long-Term Options and the Rule Against Perpetuities, 37 Cal L. Rev. 235, 267.

However, the same objections do not apply to all forms of options, and the courts have excepted certain types of options not considered to fall within the rule. Thus, courts have generally held that an option to purchase land is valid as a part of a long-term lease of that land. *Keogh v. Peck* (1925), 316 Ill. 318, 147 N. E. 266; *Hollander v. Central Metal & Supply Co.* (1908), 109 Md. 131, 71 A. 442. Annotation, 162 A. F. R. 581, 599.

The Restatement similarly holds such option to be outside the rule. 4 Restatement of the Law, Property, 2326, Section 395. The reason for excepting options contained in leases, aside from the complexities of the common-law rule, is that the practical benefits of enabling the actual user of the property to acquire full title justifies such an exception, especially in commercial leases. 4 Restaurant of the Law, Property, *supra*, Comment a. Further, the actual interest of a long-term lessee in the property which he leases is one of substantial value and is of itself a significant restraint upon alienability value and is of itself a significant restraint upon alienability, so that the addition of an option term to the provisions of a lease does not greatly affect alienability, where the option is limited to the lease term. Certainly an option term in a lease does not restrain alienability in any greater than covenants for renewal of the lease, to which the rule does not apply. See *Hollander* v. *Central Metal & Supply Co.*, *supra* (109 Md. 131). Realistically, in long-term commercial leases, the

granting to the lessee of an option to purchase is more likely to act as an aid, rather than a hindrance, to alienability, since the long term occupant of the property is thereby able to convey both the lease and the fee estate, and thus is more likely to encourage development and improvement of the property.

A similar problem is posed by options for the purchase of a part of an overlying surface estate, granted as a part of a mineral estate. The courts have uniformly considered such options to be vested in possession as a part of the mineral estate where the option does not in face act as a restraint upon alienation.

In *Buck* v. *Walker* (1911), 115 Minn. 239, 132 N. W. 205, the property owner sold the surface estate, but reserved mining rights and the ownership of any minerals. The deed provided that, if mining activities injured or destroyed the land or any buildings or improvements thereon, the owner of the mining rights should pay to the property owner "all reasonable and proper damages occasioned by such mining operations; or, at the option of the *** (owners of the mining rights), they may demand a conveyance to themselves of such portion of said lands as they may designate in writing from time to time, and at a price not exceeding thirty dollars per acre of the lands so designated***." The court held that this provision was not void for uncertainty or because it created a perpetuity, because the option was "***simply an incident to the exercise by the grantor of his right to explore and remove the minerlas, an alternative provision, at the election of the grantor, in place of the agreement to pay the actual damages. It begins and ends with the exercise by the grantor of his right to explore for and remove the minerals." (115 Minn., at 246.) The court considered the option right to be an incident to the mineral estate alienable as a part of that estate, and therefore held the option to be valid under the Minnesota rule against perpetuities, which provided that no interest in land be inalienable beyond the limitation of two lives in being at the creation of the estate.

In *Threlkeld* v. *Inglett* (1919), 289 Ill. 90, 124 N. E. 368, the Supreme Court of Illinois upheld an option in a deed which

provided for the taking of such portion of the surface land as necessary for the purpose of the mining rights conveyed, to be paid for at $150 per acre plus the full cash value of any permanent improvements. The court held that this option was only a means to attain the fruits and effects of the mining rights to the property, and as such was not subject to the rule against perpetuities. As the court, at page 97, stated: "* * * * the deed, when made, would not only pass the coal, oil and gas, with the right to mine and remove the same, but also the right to enter upon and use so much of the surface for the land as might be necessary to the enjoyment of the property and rights conveyed, and the agreement was merely that the land taken for such use should be paid for, when located, at the rate of $150 an acre. It was not within the rule against perpetuities." See, also, *Chicago, Wilmington & Franklin Coal Co.* v. *Ford* (C. A. 7, 1943), 133 F. 2d 610.

The rationale of those cases is that the use of the surface estate is a necessary incident to the use and enjoyment of an underlying mineral estate, as the courts have long recognized, and that the taking of a part of the surface estate necessary for mining, by means of an option, is a reasonable incident to the mineral estate. Indeed, the requirement that necessary property taken for mining be conveyed and paid for may protect the property owner from uncompensated use of his property. Since mining rights include necessary uses of the surface such as the sinking of shafts, rights of way above and below the surface, use of the land for the housing of miners, and other uses, an option which requires payment for actual use of the surface does not render the surface estate to any greater degree inalienable, where the option is limited to the exercise of those mining rights. The option, in fact, prevents an uncompensated taking for use under an easement.

Other courts have held options in mineral deeds to be void, but in each of these cases the option was exercisable either for purposes other than mining, or for a use which was not necessary for mining.

In *Barton* v. Thaw (1914), 246 Pa. 348, 92 A. 312, the

Supreme Court of Pennsylvania held that an option to purchase land for $100 per acre, unlimited in time, was void under the rule against perpetuities. Although the option was contained in a deed which conveyed the coal and other underlying minerals, the court considered the option to be exercisable independently of the mining rights. As the court, at page 358, stated:

"****The event upon which the estate is to arise, to wit, the acceptance of the option to purchase, is uncertain, being unconfined as to limit of time. The interest created by this option therefore is not vested, but contingent, and is within the rule against perperpetuities. *In that respect this case differs from one where the owner of land conveys the coal thereunder, with general mining rights and the right to use surface for mining purposes, as in Dewey v. Great Lakes Coal Company,* 236 Pa. 498, ***. *In a case like that the rights are conveyed by deed and vest immediately. There a present fixed right of future enjoyment is conveyed, although the right of enjoyment may not be exercised immediately.*" (Emphasis added.)

In *Rocky Mountain Fuel Co.* v. *Heflin* (1961), 148 Colo. 415, 366 P. 2d 577, an action to quiet title, the deed had been conveyed subject to the reservation of mineral rights, and contained an option to repurchase any part of the surface necessary to carry on mining operations, and up to 30 acres "for housing facilities, in carrying on mining operations," for $25 per acre. The Supreme Court of Colorado relied upon *Barton* v. *Thaw, supra*, in holding that the option was void under the common-law rule against perpetuities, stating, at page 422, that:

"**** the right to repurchase any 30 acres in the reservation is a right to reacquire the complete estate or fee in all the acreage which the Fuel Company might at some undetermined time in the future elect to take. Such a taking goes far beyond any interest in the minerals and amounts to a naked option in so far as it exceeds the interest which might be connected with the mineral estate. The reservation to repurchase, therefore, violates the common law against perpetuities."

The judgment in that case leaves undecided the question of

whether a more limited option would be held valid, but the language of the court indicates that if such an option were limited to the necessary and reasonable use of the mineral estate, it would be considered a vested part of the rights making up the mineral estate, and would be valid.

Middleton v. *Western Coal and Mining Co.* (D.C.W.D. Ark. 1965), 241 F. Supp. 407, was also a suit to quiet title. A 1904 deed had conveyed the coal and other minerals to defendant, along with mineral rights. The deed provided that the defendant could at any time elect to take the surface for an amount to be agreed upon by the parties, or in default of an agreement, by binding arbitration. The option was independent of the mining rights granted by the deed, and was exercisable at the discretion of the grantee and its successors or assigns. The court relied on *Barton* v. Thaw, supra, in holding that the option was in effect a grant of a contingent interest in the surface in fee, unlimited in time and thus void under the common-law rule against perpetuities. Since the option in that case was exercisable solely at the discretion of the grantee, for purposes not limited to the mining rights granted in the deed, the court's decision was clearly correct under the general rule that such options are invalid as restraints upon alienation.

The decisions of the West Virginia courts are not completely clear on this issue, but do appear to follow the general rule that an option is valid where limited to surface property necessary for the use of the mineral estate. In *Post* v. *Bailey* (1931), 110 W. Va. 504, 159 S. E. 524, an option which permitted the owner of underlying coal to purchase areas of the surface at $40 per acre to be used for coal mining facilities was held to be valid. The court held the option to be a vested right to the use of the surface, because the right to use parts of the surface sufficient for mining had been acquired appurtenant to the purchase of the underlying coal. The effect of the option, the court stated, at page 510, "was therefore merely to fix a price of $40 per acre to be paid for the use of so much of the surface as might be employed by the grantee and his assigns under the provisions of the deed."

However, in *West Virginia-Pittsburgh Coal Co.* v. *Strong* (1947), 129 W. Va. 832, 42 S. E. 2d 46, the Supreme Court of Appeals held an option provision void. The court, at page 842, characterized the opinion in the *Post* case as concerning "the distinction between a covenant granting mining rights together with the right to the use of the surface to be paid for at an agreed price and the right to acquire the title to the land itself***." That distinction is not strictly correct, since the option of the *Post* case was for the purchase of title to the surface, and not merely payment for use. However, the option provision struck down by the court was apparently not limited to purchase of surface land necessary for mining, but permitted purchase of all land overlying the vein of coal, and the plaintiff was seeking to exercise the option in order to strip mine, which the court found exceeded the mining rights granted by the deed.

A single principle is expressed in all of the above cases: A bare option to purchase land which is unlimited as to time is void as an impermissible restraint upon alienation, but an option which is appurtenant to a mineral estate and is limited to the necessary and reasonable use of the overlying surface estate for the exercise of mining rights is a presently vested part of the mineral estate, and is not void as a restraint upon alienation.

This principle is consistent both with the legal relationship between a surface estate and an underlying maineral estate, and with the realities of mining practice. The mining of a deposit inevitably requires some use of the surface for the sinking of shafts, rights of way for removal of the minerals, and other such uses dependent upon the type of mining operation. Unless the language of the conveyance by which the minerals are acquired repels such construction, a severed mineral estate is considered to include those rights to use of the surface as are reasonably necessary for the proper working of the mine and the obtaining of the minerals. 37 Ohio Jurisprudence 2d 19, Mines and Minerals, Section 14; *Harper* v. *Jones* (1946), 49 Ohio Law Abs. 289, 74 N. E. 2d 397. Similarly, the owner of the land has the right to subjacent support, and any conveyance or waiver of this right

must clearly appear in the instrument conveying the estate. *Ohio Collieries Co.* v. *Cocke* (1923), 107 Ohio St. 238, 140 N. E. 356. The owner has the right to enjoy the land free from annoyance, except such as reasonably arises from the need to exercise the mining rights of the mineral estate. *Harper* v. *Jones*, *supra*, at 294.

In our recent decision, *Skivolocki* v. *East Ohio Gas Co.* (1974), 38 Ohio St. 2d 244, the issue was also that of the relationship between a surface estate and the underlying mineral estate. The mining rights granted in the deed conveying the mineral estate were similar to those in the instant case, and included an option, "**** that for any and all surface used by the grantee, its successors and assigns, it or they shall pay at the rate of fifty dollars per acre." This court held that the option did not give an unqualified right to use the surface, and specifically did not give grantee the right to strip mine. As we said, at page 248: "**** (W)e cannot ignore the additional fact that strip mining, although similar to deep mining insofar as both represent a means to a legitimate end, necessarily and unavoidably causes total disruption of the surface estate. Time-honored rules of law, meant to insure the mutual enjoyment of severed mineral and surface estates, cannot be blindly applied to resolve a question involving the right to strip mine.****"

We also noted the legal principle, cited in 54 American Jurisprudence 2d 389, Mines and Minerals, Section 210, that, "**** unless the language of the conveyance by which the minerals are acquired repels such construction, the mineral estate carries with it the right to use as much of the surface as may be reasonably necessary to reach and remove the minerals," and commented:

"This implied right of the mineral owner is best explained as a practical attempt to insure that both he, and the surface owner, can enjoy their respective estates. To construe the 'right to use' as including the right to strip mine would be to pervert the basic purpose of a principle designed to *mutually* accommodate the owner of the mineral estate and the owner of the surface estate in

the enjoyment of their separate properties.***"

The holding in *Skivoloki* recognized that strip mining causes the total disruption of the surface estate, and is therefore in fundamental conflict with the general rule that owners of the respective estates are entitled to the enjoyment and reasonable use of those estates. As we said, at page 251, "because strip mining is totally incompatible with the enjoyment of a surface estate, a heavy burden rests upon the party seeking to demonstrate that such right exists."

In the instant cases, the taking is limited to necessary use of the surface estate for deep mining, and the use is for a mining right specifically included in the deed, namely, the right to use the surface to transport coal from other lands. In *Skivolocki*, we specifically recognized the validity of surface rights granted incident to a mineral estate, and the same principles require recognition of the mining rights granted by the deed in these cases. The options in these deeds provide only that the use of the surface necessary for the exercise of granted mining rights may be effected by payment and conveyance of necessary parts of the surface. This is a reasonable commercial arrangement, particularly in view of the length of time needed to explore and acquire contiguous blocks of territory for operation of a deep coal mine, an operation which may continue for serving decades. It is an arrangement which does not in any way create an option exercisable beyond the mining rights granted by deed, and imposes no greater restraints upon the property than would an easement. See *Moore* v. *Indian Camp Coal Co.* (1907), 75 Ohio St. 493, 80 N. E. 6.[2]

We therefore reverse the judgments of the Court of Appeals which held these options to be void.

[2] Because the options in the instant cases do not act as a restraint against alienation, and do not fall within the scope of the common-law rule against perpetuities, we need not decise the extend to which the common-law rule was in effect in 1906, the date of the original conveyances herein.

-II-

Defendants raise three other defenses to specific performance of the mining-right clauses in their deeds.

Defendants first claim that the conveyance is too uncertain in its description of the land to be conveyed, relying upon *Kling v. Bordner* (1901), 65 Ohio St. 86. However, the provision herein clearly complies with the requirement in *Bordner*, for "it contains the essential terms of the agreement expressed with such clearness and certainty that they may be understood from the memoramdum itself***." Defendants' reliance upon *Schmidt v. Weston* (1948), 150 Ohio St. 293, is also misplaced. No claim is made as to any discrepancies or deficiencies in the descriptions contained in the defendants' deeds, and in *Schmidt v. Weston, supra*, at 299, the court stated that "if the agreement upon which the action is brought or some memorandum or note thereof in writing signed by the party to be charged therewith identifies the parties and their respective obligations and the land in question, courts will apply such terms and descriptions even though parol evidence or evidence aliunde is necessary for the full understanding of the terms and descriptions set forth ***."

The right of way granted for use of the surface to transport coal from other property is also not extinguished by the Marketable Title Act (R. C. 5301.47 *et seg*). R. C. 5301.53 (E) specifically states that the Marketable Title Act does not apply "to bar or extinguish any right, title, estate or interest in and to minerals, and any mining or other rights appurtenant thereto or exercisable in connection therewith." Defendants argue that the use of the beltline to transport coal mined primarily from other lands is not "appurtenant." However that may be, the proposed use is clearly "exercisable in connection" with the mineral estate, for the belt line may be used to transport coal from that estate as well as coal from other property.

The right to use of the surface is also not barred by R. C. 2305.06. A cause of action for conveyance of the property did not accrue until the surface was needed for the exercise of grantee's mineral rights.

III

The present actions are for specific performance, seeking the conveyance of real property. Specific performance of a contract is a distinctively equitable remedy. *Commrs. of Muskingum County v. State* (1908), 78 Ohio St. 287, 305, 85 N. E. 562.

As this court said in *Spengler* v *Sonnenberg* (1913), 88 Ohio St. 192, 203: "* * * * Specific performance of contracts is a matter resting in the sound discretion of the court, not arbitrary, but controlled by principles of equity, on full consideration of the circumstances of each particular case."

Although we find the option provisions in the Litman deeds to be valid, the circumstances of the instant cases make proper the exercise of the principles of equity.

The provisions in the Litman deeds required payments of $100 and $200 per acre for any land conveyed to the grantee. These provisions date from 1906, and the changes in the purchasing power of the dollar, the likelihood of changes in the level of development and value of the property, and the simple fact that almost 70 years have passed since these deeds were written are all factors indicating that the 1906 prices cannot be conclusive. Although those prices might have expressed the intent of the parties at that time, and for a reasonable time thereafter, it is most unlikely that such prices are at present equitable, in light of widespread economic changes. "Depreciation of the currency or other medium of payment contracted for has frequently been held to justify the court in withholding specific performance, or at least conditioning it upon payment of the actual value of the property contracted for. * * *" 71 American Jurisprudence 2d 120, Specific Performance, Section 88.

In the instant cases, unless the parties agree on a price for the property to be conveyed, the trial court should condition the granting of specific performance upon ghe payment of the actual value of the property sought by plaintiff.

Judgments reversed.

O'Neill, C. J., Herbert, Corrigan, Celebrezze, W. Brown and P. Brown, JJ., concur.

APPENDIX E

AMENDMENT XIV
UNITED STATES CONSTITUTION

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath, as a member of Congress, or as an officer of the United States or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

USC 28 Section 1275 State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State Statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specifically set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, C 646, 62 Stat. 929.

Ohio Revised Code Section 2305.06 Contract in writing

An action upon a specialty or an agreement, contract, or promise in writing shall be brought within fifteen years after the cause thereof accrued.

MARKETABLE TITLES

Ohio Revised Code Section 5301.47 Definitions

As used in section 5301.47 to 4301.56, inclusive, of the Revised Code:

(A) "Marketable record title" means a title of record, as indicated in section 5301.48 of the Revised Code, which operates to extinguish such interests and claims, existing prior to the effective date of the root of title, as are stated in section 5301.50 of the Revised Code.

(B) "Records" includes probate and other official public records, as well as records in the office of the recorder of the county in which all or part of the land is situate.

(C) "Recording", when applied to the official public records of the probate or other court, includes filing.

(D) "Person dealing with land" includes a purchaser of any estate or interest therein, a mortgage, a levying or attaching creditor, a land contract vendee, or any other person seeking to acquire an estate or interest therein, or impose a lien thereon.

(E) "Root of title" means that conveyance or other title transaction in the chain of title of a person, purporting to create the interest claimed by such person, upon which he relies as a basis for the marketablity of his title, and which was the most recent to be recorded as of a date forty years prior to the time when marketability is being determined. The effective date of the "root of title" is the date on which it is recorded.

(F) "Title transaction" means any transaction affecting title to any interest in land, including title to any interest in land, including title by will or descent, title by tax deed, or by trustee's assignee's, guardian's, executor's, administrator's, or sheriff's deed, or decree of any court, as well as warranty deed, quit claim deed, or mortgage.

Ohio Revised Code Section 5301.48 Unbroken chain of recorded title.

Any person having the legal capacity to own land in this state, who has an unbroken chain of title of record to any interest in land for forty years or more, has a marketable record title to such interest as defined in section 5301.47 of the Revised Code, subject to the matters stated in section 5301.49 of the Revised Code.

A person has such an unbroken chain of title when the official public records disclose a conveyance or other title transaction, of record not less than forty years at the time the marketability is to be determined, which said conveyance or other title transaction purports to creat such interest, either in:

(A) The person claiming such interst; or

(B) Some other person from whom, by one or more conveyances or other title transactions of record, such purported interest has become vested in the person claiming such interest; with nothing appearing of record, in either case, purporting to divest such claimant of such purported interest.

Ohio Revised Code Section 5301.50 Prior Interests.

Subject to the matters stated in section 5301.49 of the Revised Code, such record marketable title shall be held by its owner and shall be taken by any person dealing with the land free and clear of all interests, claims, or charges whatsoever, the existence of which depends upon any act, transaction, event, or omission that occurred prior to the effective date of the root of title. All such interests, claims, or charges, however denominated, whether legal or equitable, present or future, whether such interests, claims, or charges are asserted by a person sui juris or under a disability, whether such person is within or without the state, whether such person is natural or corporate, or is private or governmental, are hereby declared to be null and void.

Ohio Revised Code Section 5301.53 Certain rights not barred.

The provisions of sections 5301.47 to 5301.56, inclusive, of

the Revised Code, shall not be applied:

(A) To bar any lessor or his successor as reversioner of his right to possession on the expiration of any lease or any lessee or his successor of his rights in and to any lease;

(B) To bar or extinguish any easement or interest in the nature of an easement created or held for any railroad or public utility purpose;

(C) To bar or extinguish any easement or interest in the nature of an easement, the existence of which is clearly observable by physical evidence of its use;

(D) To bar or extinguish any easement or interest in the nature of an easement, or any rights granted, excepted, or reserved by the instrument creating such easement or interest, including any rights for future use, if the existence of such easement or interest is evidenced by the location beneath, upon, or above any part of the land described in such instrument of any pipe, valve, road, wire, cable, conduit, duct, sewer, track, pole, tower, or other physical facility and whether or not the existence of such facility is observable;

(E) To bar or extinguish any right, title, estate, or interest in and to minerals, and any mining or other rights appurtenant thereto or exercisable in connection therewith;

(F) To bar or extinguish any mortgage recorded in conformity with section 1701.66 of the Revised Code;

(G) To bar or extinguish any right, title, or interest of the United States, or of the state of Ohio, or any political subdivision, body politic, or agency thereof.

APPENDIX F

USC 28, Section 1257 State Courts; appeal; certiorari final judgments or decrees renered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, C 646, 62 Stat. 929.

SUPREME COURT, U. S.

AUG 7 1975

MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1975
No. 75-80

ASHER LITMAN and JUANITA LITMAN,
Petitioners,

vs.

QUARTO MINING COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENT, QUARTO MINING COMPANY, IN OPPOSITION

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OPINIONS BELOW

The opinion of the Ohio Supreme Court is reported in 42 Ohio St. 2d 73 (1975) and is reproduced in the Appendix to petitioners' petition at page 32.

QUESTIONS PRESENTED

(1) May the petitioners raise their federal question for the first time in this Court?

(2) Is the decision of the highest court of a state in regard to the construction of real property deeds and statutes of said state conclusive?

(3) Is a defendant given due process of law pursuant to the Fourteenth Amendment of the United States

Constitution, when the highest court of a state holds that a plaintiff's mining rights are vested property rights appurtenant to a mineral estate and valid, but the owner of said right to acquire needed surface land is to pay the present fair market value of the surface lands to be conveyed?

COUNTERSTATEMENT OF THE CASE

The facts as established in the trial court may be briefly summarized as follows:

Plaintiff, Quarto Mining Company, an Ohio Corporation, is engaged in the mining of coal in Monroe County, Ohio, and is the owner of 51,700 acres of the Pittsburgh or No. 8 vein of coal and mining rights in said County, including the mining rights which have been a matter of record in defendants, Asher Litman's and Juanita Litman's deeds for approximately sixty-eight (68) years. Said mining rights are correctly quoted, except for one immaterial omission, on pages 2 and 3 of petitioners' brief.

The coal underlying the surface now owned by defendants, Asher Litman and Juanita Litman, was first conveyed, together with the mining rights and privileges referred to above, by deeds in 1906. In addition, the severance of said coal and mining rights has been noted in every deed in defendants' chains of title, including defendants' present deeds.

Accordingly, plaintiff, Quarto Mining Company, relying on the validity of said mining rights, has agreed to supply various utility companies with coal from its No. 7 mine pursuant to a contract for the next thirty-five (35) years. To transport the coal from the entrance of said

No. 7 mine to the Ohio River, plaintiff seeks to establish an overhead conveyor belt line. The total length of said overhead belt line when completed will be approximately 5000 feet.

The need for such a belt line from the mine entrance to the loading docks on the Ohio River becomes apparent when one notes that plaintiff expects to mine 3,200,000 tons of coal per year to be sold to various utility companies. In addition, over the life of said deep mine, plaintiff expects to mine 111,000,000 tons of coal, which all will be transported to the utility companies for the generation of electric power.

In reference to the two small parcels of 1.32 acres and 1.4568 acres of land needed for said belt line owned by Asher Litman and Juanita Litman, it should be noted that said parcels lie in a valley between two steep hills, making it impossible for plaintiff to relocate its belt line around their properties. The reason plaintiff cannot relocate its belt line on or over said hills is because a conveyor belt to transport coal cannot be operated on a slope of over 16° or the coal will roll back on the conveyor belt and the hills surrounding the valley where the Litmans' lands lie have a slope of 25° to 27°.

Further, it should be stated, that plaintiff's belt line does not interfere with any buildings or structures on defendants' lands. Said belt line passes over the Litmans' properties at a minimum height of 25 feet and at a maximum height of 30 feet with only the belt line's supporting columns actually touching defendants' lands.

Petitioners did not raise in any of the courts below the constitutional question which they now seek to raise. No constitutional question was raised at all in the Common Pleas Court or the Court of Appeals. In the Supreme

Court of Ohio petitioners alleged that the interpretation by the Court of Appeals of the easement rights (Appendix to the Petition, hereinafter, "Pet. App.", p. 30) was an unconstitutional taking of property without due process of law. However, the Supreme Court of Ohio did not pass on this question (Pet. App. p. 35). The opinions of the Supreme Court of Ohio and lower courts are devoid to any reference to a constitutional question.

REASONS FOR NOT GRANTING THE WRIT

I. Petitioners' federal question was not raised below.

Petitioners did not comply with Rule 23 1(f) of this Court by stating "the stage . . . at which and the manner in which the federal questions sought to be reviewed were raised." In fact petitioners did not raise in any of the State Courts the constitutional question here sought to be raised. Under these circumstances even if the petition were granted it would later be dismissed. *Cardinale v. Louisiana*, 394 U.S. 437 (1967).

II. The question raised by petitioners is a matter of state real property law and the Supreme Court of the United States follows the decisions of the highest court of a state in regard to the real property law of that state.

Petitioners seek in their petition for a writ of certiorari to have this Court interpret state statutes and construe deeds for Ohio real property in a way contrary to the way the Ohio Supreme Court has interpreted said state statutes and deeds. Accordingly, petitioners have cited O.R.C. §2305.06, entitled, "Contract in writing," which reads in its entirety, as follows:

"An action upon a specialty or an agreement, contract, or promise in writing shall be brought within fifteen years after the cause thereof accrued." (Pet. App., p. 48.)

The Ohio Supreme Court held on this point, as follows:

"The right to use of the surface estate is also not barred by R.C. 2305.06. A cause of action for conveyance of the property did not accrue until the surface was needed for the exercise of grantee's mineral rights." (*Quarto Mining Co. v. Litman, supra*, at page 86; Pet. App. 45.)

This is the law of Ohio.

The second state statute or group of state statutes, which petitioners say were misconstrued was the "Ohio Marketable Title Act," (R.C. 5301.47 *et seq.*). As to these statutes, the Ohio Supreme Court correctly held, as follows:

"The right of way granted for use of the surface to transport coal from other property is also not extinguished by the Marketable Title Act (R. C. 5301.47 et seq.). R. C. 5301.53(E) specifically states that the Marketable Title Act does not apply 'to bar or extinguish any right, title, estate or interest in and to minerals, and any mining or other rights appurtenant thereto or exercisable in connection therewith.' Defendants argue that the use of the belt-line to transport coal mined primarily from other lands is not 'appurtenant.' However that may be, the proposed use is clearly 'exercisable in connection' with the mineral estate, for the belt line may be used to transport coal from that estate as well as coal from other property." (*Quarto Mining Co. v. Litman, supra*, at page 86; Pet. App. 45.)

This is clearly a correct interpretation of Ohio's "Marketable Title Act," where it has been determined that the mining right in question is a vested part of the separate and distinct mineral estate and, therefore, said mining right fits exactly into the language of O.R.C. Sec. 5301.53 (E), which reads as follows:

"§5301.53, entitled, 'certain rights not barred.'

The provisions of sections 5301.47 to 5301.56 inclusive, of the Revised Code, shall not be applied:

(E) To bar or extinguish any right, title, estate or interest in and to minerals, and any mining or other rights appurtenant thereto or exercisable in connection therewith."

Thus, both the state legislature and the Ohio Supreme Court have spoken on said subject and have said that said mining rights are not barred by said "Marketable Title Act."

Clearly, then the law of Ohio on all of petitioners' alleged errors has been determined by the Supreme Court of Ohio, and this Court has held consistently that the Supreme Court of the United States will follow the decisions of the highest court of the state, in regard to the title to real estate and the construction of deeds and statutes in respect thereto. (*Hanrick v. Patrick*, 119 U.S. 156 (1886); *Clement v. Packer*, 125 U.S. 309 (1888); *Ridings v. Johnson*, 128 U.S. 212 (1888); *Gormley v. Clark*, 134 U.S. 338 (1890); *Halstead v. Packer*, 140 U.S. 273 (1891).) Accordingly, the Ohio Supreme Court's interpretation of the statutes of the State of Ohio is correct and no federal question is raised by petitioners in their petition for a writ of certiorari in this case.

III. Petitioners' question of due process of law is not well taken, since the Ohio Supreme Court found defendant's mining rights to purchase needed surface lands valid and, in addition, ordered defendant to pay to petitioners the present fair market value of the property to be conveyed.

Petitioners allege that the decision of the Ohio Supreme Court in this case has denied to them due process of law. However, this Court has held repeatedly that the mere fact that a person is unsuccessful in a court in a matter involving life, liberty, or property does not show that there has been a denial of due process of law. (*Worcester County Trust Co. v. Riley*, 302 U.S. 292 (1937).) Accordingly, petitioners' allegations of the Ohio Supreme Court committing "gross errors" in construing Ohio statutes and deeds are not well taken and certainly do not present a substantial federal question under the Fourteenth Amendment of the United States Constitution. For this Court has held that even an erroneous decision, which this decision is not, of a state court on matters within its jurisdiction does not deprive the unsuccessful party of his rights under the guaranty of due process where the parties have been fully heard in the regular course of judicial proceedings. (*Howard v. Kentucky*, 200 U.S. 164 (1906).) Petitioners have had their case fully heard in every court of the State of Ohio, including the Ohio Supreme Court, which rendered a thoroughly reasoned opinion upholding respondent's mining rights to purchase needed surface lands, with the provision that respondent pay to the petitioners the present fair market of the surface lands to be conveyed. (*Quarto Mining Co. v. Litman, supra*, at page 86; Pet. App. 46.) Thus, petitioners have had due process of law pursuant to the Fourteenth Amendment of the United States Constitution.

The cases cited by petitioners on page 6 of their brief are not in point. *Green v. Frazier*, 253 U.S. 233 (1920) was a tax case. *Brinkerhoff-Faris Trust and Savings Co. v. Hill*, 281 U.S. 673 (1930) was a procedural due process case and a tax case. *Worcester County Trust Co. v. Riley*, 302 U.S. 292 (1937) was a tax case. *Roberts v. New York*, 295 U.S. 264 (1935) was a condemnation case which, of course, is a state action. Not one of the petitioners' cases has anything to do with a controversy between private parties, much less one involving real property law.

CONCLUSION

The petitioners have not properly raised any federal question in this Court. The question attempted to be presented by petitioners is a matter of Ohio real property law, which has been determined by the Ohio Supreme Court after a complete review of the proceedings in the trial court and court of appeals; said Ohio Supreme Court has construed the applicable Ohio statutes and, therefore, no substantial federal question has been raised to occasion the intervention of this Court. The petition should be denied.

Respectfully submitted,

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